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ABSTRACT

The Bakke case raised profound and critical issues for America, and the results of the Supreme Court decision will extend far beyond flaws in medical admissions policies. The Bakke decision is an economic one, with which affirmative action programs are incompatible; affirmative action programs involve a degree of economic engineering that the Bakke situation finds unacceptable. The surface of the case hides a modified Darwinian principle of the survival of the fittest and slickest, and the Bakke decision can be realistically expected to unleash a flood of lawsuits challenging the legality of affirmative action programs. This modified Darwinian principle will eventually be substituted for more humane legal principles by the Supreme Court. (Author/HSE)

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The Bakke Case and Special Admissions Programs: A Case For Concern

by

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Chapter 1

INTRODUCTION

Long before Allan Bakke filed his well-known lawsuit against the U.C. Davis Medical School, the White American mind was deeply split on the question of equal educational opportunity versus the right to equal protection under the law. While most White Americans favor equal access to higher education, they overwhelmingly reject the use of "race conscious" means which take into account the academic disadvantage resulting from the effects of past discrimination. Yet they hold that each member of our democratic society should have full access to education.

Although this equal access notion is advanced, securing equality in education for minority group members, Blacks in particular, remains a difficult and complex task. There has been progress, yet victory is not in sight, as evidenced by the flurry of "reverse discrimination" charges.

The realities are that the effects of "societal discrimination" have left Blacks with credentials that are less impressive than they would have possessed if they had not been subjected to historical and continuous discrimination. Although other ethnic groups can claim a past history of discrimination, "The experience of (Blacks) in America has been different in kind, not just in degree, from that of any other ethnic group," as a subdued Justice Marshall observed in his dissenting opinion in the Bakke case. Racism has been so pervasive in our society, Justice Marshall noted that no Black, "regardless of wealth or position, has managed to escape its impact."¹

At the heart of the issue is the legality and fairness of "reverse discrimination" to overcome the pervasive effects of injustices done to Blacks in the past. Like segregation and desegregation, the issue of "reverse discrimination" versus special admissions criteria is a continuous struggle for dominance of one over the other. Basic to the issue is the "assumption that someone who ordinarily would have been admitted or allowed to participate is denied, in favor of someone who would not have ordinarily been admitted."²

On the one hand, Blacks view the opportunity to participate in and enjoy the privileges and responsibilities associated with quality education as the most precious and desirable human right within society. Historically, they have relied upon the merits of educational preparation and attainment to liberate themselves from the chains of environmental circumstances, including "societal discrimination". It is through the quality and level of education that individuals are screened to share in the nation's wealth. On the other hand, a "schizophrenic White America"--realizing that education is society's major sorting institution--continues and succeeds in erecting arbitrary barriers against laws and initiatives to obtain an education which is a necessary condition for social and economic progress.

Accordingly, the purpose of this paper is to provide a reasonable justification for the preferential treatment afforded Blacks in special admissions programs. A second purpose is to attempt to weigh the impact that the Bakke case has had on special admissions programs.

Chapter 2

BACKGROUND OF THE BAKKE CASE

The origins of the Bakke case go back to 1968 when U.C. Davis Medical School opened, in that there were no Black or Chicano students in the school.³ In 1969, less than one percent of the students admitted to the medical school were racial minorities although California has a minority population of better than 25 percent. Under intense pressure from Blacks and other minority students, the medical school established a special admissions program for minority students.⁴

Each year the medical school admits 100 students. Of these 100 positions, 16 are set aside for those selected by a special admissions committee, which evaluates the applications of minority-group applicants only. The admissions standards for minority applicants were deliberately lower than the admission standards for White applicants. Moreover, minority applicants competed only against one another.⁵ Between 1970 and 1974, 59 Black and Chicano students were admitted under the special admissions program, but only 7 were admitted under the regular program. The following table provides a year-by-year comparison of minority admission at the Davis Medical School.

Under the regular admission procedures, any applicant who has a grade point average of below 2.5 on a scale of 4.0 is automatically disqualified. An applicant for the special admissions program is not so disqualified.

	<u>SPECIAL ADMISSIONS PROGRAM</u>				<u>GENERAL ADMISSION</u>				<u>TOTAL</u>
	<u>Blacks</u>	<u>Chicanos</u>	<u>Asians</u>	<u>Total</u>	<u>Blacks</u>	<u>Chicanos</u>	<u>Asians</u>	<u>Total</u>	
1970	5	3	0	8	0	0	4	4	12
1971	4	9	2	15	1	0	8	9	24
1972	5	6	5	16	0	0	11	11	27
1973	6	8	2	16	0	2	13	15	31
1974	6	7	3	16	0	4	5	9	25

Source: The Los Angeles Daily Journal

In 1973 and again in 1974, Allan Bakke, a White engineer, entered the competition for one of the 100 positions in the entering class of the U.C. Davis Medical School. His enthusiasm to be a doctor was so strong that in off-hours he took premed courses and worked as a hospital volunteer.⁶

Bakke had a grade point average of 3.51. In 1973 his benchmark score for purpose of admission was 468 out of a possible 500; in 1974, when he reapplied, it was 549 out of a possible 600. He was not admitted nor placed on the waiting list in either year. In both years, minority applicants were admitted under the special admissions program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's.⁶

Rejected for two straight years, Bakke learned that his college grade point average, MCAT and benchmark scores ranked well above many of the minority students who had been accepted. The only explanation, as far as he could see, was that they were Black, Chicano and Asian-American, and he was White.

With these facts, Bakke filed suit in the Superior Court of California. He charged that he was a victim of "reverse discrimination" because the medical school had set aside 16 of 100 positions for minority students, and that he was better qualified for admission than some of the students admitted under the special admission program.

In November 1974, the Superior Court ruled that the medical school's special admissions program was invalid because it discriminated against Bakke because of his race. But the court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special admissions program.

Both the medical school and Bakke appealed the ruling. In an unusual move, the California Supreme Court agreed to hear the case without waiting for a state appeals court to hear and decide the case.

After hearing the arguments, the California Supreme Court on September 16, 1976, ruled that the medical school's special admissions program was unconstitutional because it violated the equal-protection clause of the Fourteenth Amendment and ordered Bakke's admission.

In November 1976, the medical school secured permission from the U.S. Supreme Court to keep its special admissions policy in effect until it could appeal the California Supreme Court's ruling. Finally, the school appealed and the Supreme Court Justices heard arguments in the case in early October 1977.

By a 5 to 4 vote on June 28, 1978, the U.S. Supreme Court struck down U.C. Davis' special admissions program that had set aside 16 of 100 medical school openings a year for Blacks, Chicanos, Asians and American Indians.

In another 5 to 4 vote, the court said that race could be taken into account as one of several factors in a flexible, individual admissions program, aimed at ensuring diversity in the student body.

Chapter 3

THE POLITICS OF THE BAKKE CASE

The issue of race-conscious admissions programs to ameliorate the effects of past discrimination on Blacks has generated an intense conflict which is legally complex, economically pervasive and politically explosive. On the one hand, it feeds on emotional backlash from threatened White males who claim that they are being penalized today for the sins of yesterday. On the other hand, it angers Blacks who are denied their share of the American dream. Consequently, a struggle of interest is going on, and the law is seen as a weapon in the hands of those who possess the power to use it for their own ends.

In this period of economic crisis, people are justifiably concerned about the allocation of "just shares" of wealth and limited places in graduate and professional schools where there are twice as many applicants as openings.⁸ As the government gets deeper into the business of allocating "just shares" of wealth and opportunity to approved victims, membership in those groups becomes valuable. When the shares of wealth being distributed are in short supply and some get more of these shares because of their race, then others get less because of their race. Basic economics shows why. If a medical school has openings for 100 applicants, and if 16 Blacks are admitted, then there are only 84 places left for White applicants. It is inevitable, in such a situation, that interests will clash.

Because of the intolerable burden that the explosive issue placed on our socio-educational, economic and political system, the U.S. Supreme Court decided to rule on the issue in an attempt to calm national emotion by appeasing both sides. The Court, sensitive to the enormous political effect its ruling will have, successfully decided the issue on narrow grounds, creating as restricted a precedent as possible. In other words, there was a trade-off.

However, the Supreme Court Justices were just as torn by the issue as was the rest of the nation. The nine Justices produced six separate opinions. It seemed as if no one wanted to agree with anyone else. It took a combination of at least two opinions to produce a majority view on any issue. According to Time Newsmagazine the opinions were sent to the printer four times, but only to be retrieved three times for additions, deletions and revisions.⁹

Associate Justice Powell, who bridged the gap between the two groups, noted that "Perhaps no case in memory has received so much media attention and scholarly commentary. . .and advice." Acknowledging the lack of unanimity on the Court he added, "Perhaps it's fair to say we needed this advice."¹⁰ Not counting briefs filed by Bakke's lawyers and U.C. Davis, the case attracted 58 friend-of-the-court briefs, 42 backing U.C. Davis' admissions policy and 16 siding with Bakke.

By ruling narrowly and delicately, the Court succeeded in finding a middle ground between stridently opposed forces on the deeply emotional issue of "reverse discrimination". The Court's ruling was so balanced, in fact, that many felt that nobody lost. Ironically, the ruling permitted both critics and supporters of Affirmative Action programs to claim victory. In this respect, the Court had accomplished the near impossible:

It had handed down a decision that would partly satisfy most people and strongly dissatisfy only a few.¹¹ Consequently, the Court was praised for "judicial statesmanship," on the one hand, and condemned for an "absolutely absurd" decision, on the other hand. Alan Derschowitz, a law professor at Harvard University, said "The decision will go down in history not for what it did, but for what it didn't do. It neither legitimized racial quotas not put down Affirmative Action programs."¹²

Given the Court's disappointingly narrow and confusing decision, educational institutions and society at large will continue to wrestle with how best to allocate "just shares" of limited resources to those who have been historically deprived and remain cognizant of those who must, of necessity, be temporarily denied.

Chapter 4

THE IMPACT OF PUBLIC OPINION AND BAKKE'S CHILLING EFFECT ON SPECIAL ADMISSIONS PROGRAMS

Impact of Public Opinion

Although the jury is in on the Bakke case, the controversy surrounding it has raised a far more fundamental question: What do White Americans really believe about racial equality and what steps are they really willing to undertake to achieve it? My findings are surprising and very troubling: The roots of racism are very deep in America! To live with the pretense that racism does not exist in our society, is to delude yourself. Mismanaged garbage and smoke pollute our environment, but racism does so to an even greater degree.

More Americans than every before are aware that Blacks have suffered from the pervasive effects of societal discrimination, and most people say that further progress towards complete equality should be made. Yet at the same time, the evidence clearly indicates that most White Americans do not want full integration of the races and overwhelmingly reject the use of Affirmative Action programs to achieve full equality.

In 1976, for example, a Harris survey asked, "Generally speaking, do you favor full racial integration, integration in some areas of life, or separation of the races?" While only 12 percent of the Whites responding favored "separation of races," just 28 percent supported "full racial integration." The most popular response was "integration in some areas of life," which was chosen by 48 percent of the Whites.¹³

A 1977 Gallup poll asked the following question: "Some people say that to make up for past discrimination, women and members of minority groups should be given preferential treatment in getting jobs and places in college. Other say that ability, as determined by test scores, should be the main consideration. Which point of view comes closest to how you feel about this matter?" Preferential treatment was rejected by a margin of eight to one.¹⁴

Notwithstanding efforts to defend and extend the gains of the 1960's, public attitudes offer little encouragement for such efforts. The opponents of aggressive measures for furthering racial equality are ahead in presenting their case to the public, as evidenced by the flurry of reverse discrimination charges. As a result, these measures are losing in the court of public opinion.

Bakke's Chilling Effect on Special Admissions Programs

During the Supreme Court's deliberation on the Bakke case, graduate and professional schools were backing away from their commitments to minority group students.

Commenting on the lack of commitment, Peter Roos, Director of Education Litigation for The Mexican-American Legal Defense and Educational Fund said, "There is a terrible lack of commitment to those programs. It's as though they're all playing for a potential loss" in the Bakke case.¹⁵

Ralph Smith, Assistant Professor of Law at the University of Pennsylvania added, "The Bakke case has had a chilling effect on professional schools that had intended to start new (special admissions) programs. They are now reluctant to do so. It also has had a chilling effect on the minority students themselves, who might have applied but are now afraid they're not wanted."¹⁶

A spokesman for the National Association of College Admissions Counselors described the Bakke dilemma as, "A damned-if-you-do-and-damned-if-you-don't situation for many (educational) institutions. If they back off from special admissions, people get mad at them. If they stick with the programs, they're in trouble too."¹⁷

In November 1977, the General Counsel for the California State University and Colleges system advised the system's 19 campuses to stop administering a national scholarship program for minority-group engineering students, on the grounds that it was unconstitutional.¹⁸

After the Supreme Court struck down the special admissions program at U.C. Davis, the Los Angeles Times reported on several special admissions programs in California's law and medical schools that would have to be altered to comply with the Court's decision. These professional schools are as follow:

- U.C. Davis Medical School will have to make drastic changes.
- Stanford University will "probably have to modify its program." Presently, the program is "reserved exclusively for minorities who fall within a certain test score and grade point average range."
- U.S.C.'s law school program will be altered. The law school "reserves for minorities a fixed number of slots over and above normally admitted students."¹⁹

The Court was silent on the issue as to how its decision was to be implemented. Thus it provided no precise guidelines as to how to formulate acceptable special admissions programs. However, it did allude to the Harvard model. But as pointed out in Newsweek, "Colleges without Harvard's shining name and bulging coffers may not be able to attract enough highly qualified minority applicants -- or offer the financial aid to keep them."²⁰

Dean William Warren of the U.C.L.A. Law School, responding to the lack of specific guidelines, said: Nothing is really cleared up that much. The fact that we can take race into consideration means we can have a minority program . . . At some point somebody is going to have to decide how many (minorities) we are going to have."²¹

Dean Charles Meyers of the Stanford Law School said that if the Court's language is vague about how race is to be used--and most legal experts agreed that it was--then it will serve simply to "fuel the fire for further contention (over) special admissions."²²

Kenneth Tollett, Director of the Institute for the Study of Educational Policy at Howard University, predicts a "chilling effect," arguing that schools, fearing lawsuits, "will tend to be overly cautious in extending themselves toward minorities."²³

In addition to the impact in California, the decision has also triggered a review of admissions procedures by colleges and universities across the country.²⁴

Chapter 5

SPECIAL ADMISSIONS PROGRAMS AND RACIAL INEQUALITY

In the face of the legacy of slavery and racism during the last three centuries, it is hard to believe that the U.S. Supreme Court has given a well-to-do White man judicial relief on the grounds of "reverse discrimination." Notwithstanding, the Bakke decision could affect fundamentally every program that seeks to remedy the legacy of slavery and racism by "race conscious" means. In short, it will make the victims responsible for being victims.

Helping minorities as victims of past discriminatory practices, the Court said, does not justify a program that "imposes disadvantages upon persons like (Bakke) who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."²⁵ This ruling turns on the notion of individual rights and sounds very moral and high-minded indeed, but it ignores basic social reality. For example, Blacks have not been denied equal educational opportunity as individuals but as a class--even after the Supreme Court rendered its landmark decision on public school desegregation in the Brown case.

More than ever before we are challenged by the words and practices of yesterday. For example, the Fourteenth Amendment to the U.S. Constitution reads in part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The amendment was clearly designed to insure that Blacks, former slaves, were to be as equal as Whites with respect to the reception of service and equal protection with respect to opportunity. Though, historically, neither has occurred!

The "separate but equal" doctrine, backed by a decision of the U.S. Supreme Court in 1896, was a new form of slavery which perpetuated racial discrimination even after slavery was abolished. Thus, once again, White America took an irrelevant characteristic and used it systematically to allocate social benefits and burdens of various sorts.

In 1954, the Court rendered its landmark decision on public schools which banned forever the 60 year old system of "separate but equal" schools. The Court affirmed that separate facilities for Blacks were inherently unequal. Just as White America freed the slaves a little over a century ago with no Affirmative Action programs to make their freedom meaningful, White America, in 1954, formulated no programs to make integration real. Nearly a quarter of a century has passed, and the oppressive barriers which deter the progress of Blacks still remain.

The retreat of the Supreme Court, then, occurs at a most difficult time, as institutional racism and the oppression of Blacks continue to be an integral part of our society and legislative acts and constitutional amendments appear insufficient in rooting them out.

Allan Bakke's Stolen Credentials

The question arises, in view of pervasive "societal discrimination" in years past, is it fair or just to even the score with special admissions criteria by giving preferential treatment to Blacks? I maintain that far greater injustices result from not doing so. Blacks benefiting directly from special admissions programs may not have been discriminated against, but they suffer from injustices done to their ancestors. The effect of such injustices to Blacks involve having been deprived of the wealth, education, or employment associated with unequivocal participation.

Patricia Harris, Secretary of Housing and Urban Development, speaking out on the dynamics of Blacks and poverty said: "Because we kept you out for 300 years, you start at the bottom and you start behind; we didn't even let you have middle-class parents, so that they could give you a leg up. But we got it; we started out ahead."²⁶

These attitudes persist despite the fact that Affirmative Action programs have been a fixture in the American society since the Kennedy Administration. At the time, these programs were justified by comparing the situation of Blacks to that of a shackled runner:

"Imagine a 100-yard dash in which one of the two runners has his legs shackled together. He progressed 10 yards, while the unshackled runner has gone 50 yards. At that point the judges decide that the race is unfair. How do they rectify the situation? Do they merely remove the shackles and allow the race to proceed? Then they could say that equal opportunity now prevailed. But one of the runners would still be 40 yards ahead of the other. Would it not be the better part of justice to allow the previously shackled runner to make up the 40 yard gap; or to start the race all over again?"²⁷

Although this is still an apt analogy to the situation of Blacks in America today, a well-known pugnacious and unshackled runner successfully challenged the right of a university to judge the fairness of a race when the other runner was shackled. The unshackled runner was the first to cross the finish line. When the judges of the race refused to award him the prize, the unshackled runner argued that "In any race the winner is the runner that finishes first, even though the other runner is shackled." Nevertheless, the judges still refused to award the prize to him. At that point, the unshackled runner took his case to court. Finally, after some deliberation the court said:

"In 1896 this court held that it was unlawful for shackled runners to participate in races with unshackled runners. In 1954, under pressure from several shackled runners, this

court granted judicial relief by allowing shackled runners to participate in races held at certain high schools. Over the years, shackled runners have construed our ruling to mean all races. This court never said that shackled runners could participate in races held at universities. For all the reasons expressed herein, this unshackled runner and all unshackled runners like him 'bear no responsibility for whatever harm the shackled runners are thought to have suffered.' Therefore, the prize belongs to the unshackled runner. The judges of the race were negligent."

The derision given herein is also an apt analogy to the Supreme Court's present lack of concern for shackled runners--those who have been victimized.

In any race, if some runners start out with unfair advantages, how can choosing the winner by judging who finishes first be a fair measure of accomplishment? The same is true of limited places in graduate and professional schools. What is relevant is how these applicants have obtained their credentials and what their credentials would have been if they had not been beneficiaries of injustices.

An unshackled Bakke has very impressive credentials. He attended the best schools: the University of Minnesota, where he had close to an 'A' average, and Stanford University where he later earned a master's degree. He scored in the 90th percentile on most of his medical school admission tests, significantly higher than the average for all regular admittees in both 1973 and 1974. His mother was a teacher, and his boss doesn't "know of anyone brighter or more capable." He earns \$28,600 per year, more than four and one-half times that of a Black family, and two and one-half times more than that of a White family. He lives in the affluent San Francisco suburb of Los Altos.

How did Bakke obtain these enviable and rarely found credentials and high-on-the-hog standard of living: Was he just plain smart? Was it

merely the result of plain hard work? Or did he start out with an unfair advantage?

Given Bakke's fact-file, it is clear that he started out with an unfair advantage. He progressed 50 yards while a shackled Llorens Pembrooks from Watts, a Black medical student at U.C. Davis, had only gone 10 yards. Little Llorens Pembrooks was admitted via the special admissions program. It is conceivable that he would have been admitted under general admission procedures if he and his ancestors had received the same fair and equal treatment that Bakke received from the start. At the same time, Bakke would have been far less qualified had he not reaped the benefits of an unjust system which favored him at virtually every turn. Against the advantage of Bakke's credentials and money, the special admissions program was all a naked and dejected Pembrooks had.

Bakke maintains that he is being penalized for the sins of yesterday. Yet his favorable starting position was clearly derived from injustices done by his ancestors to Pembrooks' ancestors! Bakke's ancestors' power, prestige and influence was during times when there was not even the slightest pretense of fair treatment and equal opportunity for Pembrooks' ancestors. The only logical conclusion is that Bakke is in possession, in part, of Pembrooks' stolen credentials. Until the debts of Pembrooks' ancestors are avenged, the sins of the father must be visited on the son. Therefore, Bakke has no profound right to one of the medical school openings even if he violated no one's rights. A son who has inherited stolen credentials should not be jailed for the theft; but he has no right to start out ahead and may reasonably be expected to give up his unfair advantage. It is only fair that Bakke's stolen credentials, in part, be transferred to Pembrooks, the son of the thief's deceased victim. Whatever

theoretical or superficial injustice Bakke may suffer is justified, since greater injustice results from not transferring the credentials. Even if Bakke or his ancestors never discriminated or benefitted from injustices, to prefer him over Pembrooks, who has suffered, would allow him to benefit from the debilitating consequences of racial discrimination.

Special admissions programs, then, compensate for the lack of equal opportunity by considering what things would have been like for Pembrooks had he and his ancestors received the same fair and equal treatment as did Bakke and his ancestors from the start. Martin Luther King wrote:

"A society that has done something special against (Blacks) for hundreds of years must now do something special for (them), in order to equip (them) to compete on a just and equal basis."²⁸

Credentials Per Se

Today, selective graduate and professional schools have more qualified applicants than they can enroll. And since applicants exceed annual openings, persons like Bakke argue that the only relevant factor influencing admissions decisions should be academic credentials. These beneficiaries of injustices would allow past injustices to flow into the present by failing to factor out unjust causes of Black applicants academic credentials.

The Carnegie Council on Policy Studies in Higher Education indicated in a recent report that institutional ambitions has led institutions to set minimal standards at a very high level, more for purposes of public relations and enhancement of prestige than as a consequence of careful, rational analysis of the intellectual demands that their programs require. Such ego inflation, in turn, screens out very high proportions of educationally disadvantaged students, particularly racial minorities.

"The faculty, having created an artificial floor that is too high, . . . is tempted then to waive or alter such standards on the basis of race . . . "29

Although the council urged that institutions be given maximum latitude in exercising professional judgments about what students to admit, it also urged professional schools to avoid excessive reliance on tests and grades. While grades can help predict the students likely to excel or fail academically, the council's report said such measures "are not sufficient for determining the admissibility of a great many persons found between those extremes."³⁰

The report also said: "Too many favors have been given by too many institutions, including professional schools, to those with special influence. Such actions do not meet the test of fairness, however realistic they may be as specific political actions."³¹

Similarly, David Saxon, President of the University of California, noted: "It does no service to any student to admit one who is unqualified and . . . doomed to experience failure. But we need to be equally sure that no student with the academic potential is filtered out of the system by inappropriate admissions criteria."³²

Educational Involvement of Blacks and Other Minority Groups

When the Supreme Court struck down the "separate but equal" doctrine, the presumption was that if Blacks were given the same educational opportunity as Whites, it would in time be possible to have Black lawyers and judges, physicians, dentists, engineers, and college and university professors in the same proportion to the Black population as White professionals in the White population.³³

Notwithstanding that presumption, Justice Marshall observed in his blistering dissent in the Bakke case that: "Although (Blacks) represent

11.5% of the population, they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors." At that point, he noted that, "The relationship between (these) figures and the history of unequal treatment afforded to (Blacks) cannot be denied."³⁴

The degree to which Blacks, Hispanics and other minorities are underrepresented in professional and graduate schools is shown in Table 1. To illustrate, Blacks and Hispanics made up about 17% of the total population in 1977-78. They represented, however, 10.5% of medical school enrollment, 6.6% of law school enrollment, 8.2% graduate school enrollment. Table 1 suggests that special admissions programs have had some progressive impact on minority group representation in higher education. This is undeniable. But it is equally true that much remains to be done as these improvements are quite recent.

The statistics in Table 1 indicate that minority group students are still underrepresented in comparison to their proportion in the population at large. But how could it be possible, then, that minority group students are keeping Whites out of school, when minorities are still grossly underrepresented in higher education? How could it be possible that good White students cannot get into medical school because there are too many minority doctors, where there is one Black doctor for every 4,200 Blacks, one Chicano doctor for every 30,000 Chicanos, compared to one White doctor for every 650 Whites?³⁵ How could it be possible that minorities are causing unemployment among Whites when the latest unemployment rate for minorities is twice that of Whites? How could it be that Blacks are moving too fast when the median income of a Black family is only 60% of the median income of a White family, and the percentage of Blacks who live in families

Table 1

CHANGING PATTERNS IN PROFESSIONAL AND GRADUATE SCHOOLS

	<u>Percentage of Enrollment</u>	
	1970-71	1977-78
<u>Medical Schools</u>		
Blacks	4.1%	6.7%
Hispanics	0.8%	3.8%
Whites	93.4%	85.1%
Other minorities	1.7%	4.4%
<u>Law Schools</u>		
Blacks	3.9%	4.5%
Hispanics	1.1%	2.1%
Whites	94.2%	91.9%
Other minorities	0.8%	1.5%
<u>Graduate Schools</u>		
Blacks	4.2%	6.0%
Hispanics	1.2%	2.2%
Whites	92.3%	83.2%
Other minorities	2.3%	8.2%

Source: HEW; Association of American Medical Colleges; Association of American Law Schools

with income below the poverty line is nearly four times greater than that of Whites?³⁶

The myth that minorities are at fault is akin to the vicious campaigns waged by Czarist Russian authorities and Nazi German officials that the Jewish minority was behind all the evils that befell those countries.

Chapter 6

CONCLUSION

The Bakke case raised profound and critical issues for America. Accordingly, the Court's decision will extend far beyond flaws in medical school admissions policies. Justice Marshall, in his dissenting opinion, wrote, "There is (no) computer capable of determining the number of persons and institutions that may be affected" by the decision.

Just as Bakke is to affect only the field of higher education, the old Plessy decision was to affect only public transportation. However, it was soon extended to encompass every facet of social discourse, including education. States authorized laws which required separate phone booths for Blacks and Whites, and that textbooks used by children of one race be kept separate from those used by the other race. In 1898, after Plessy, the Charleston News and Courier printed a parody of Jim Crow laws:

"If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats . . . If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court--and a Jim Crow Bible for Colored witnesses to kiss."³⁷

The irony is that before many years had passed, with the exception of the Jim Crow witness stand, "All the improbable applications of the principle suggestion by the editor in derision had been put into practice--down to and including the Jim Crow Bible."³⁸

Like Plessy, the Bakke decision will be twisted and turned a thousand shapes. Moreover, there will be ingenious schemes to extend the ruling to every activity requiring Black and Brown participation. It will be as Ramona Ripston, Executive Director of the Los Angeles Chapter of ACLU, pointed out, "People who want to interpret (the decision) in their own way may interpret it such that they don't have to continue to expand their (Affirmative Action) programs."

While Plessy was a social model, Bakke is an inflexible economic model. In the days of Plessy, Whites were concerned with maintaining and enhancing their social standing by exemplifying their superiority over Blacks. In the Bakke model, however, they are more concerned with basic human needs to sustain life itself--food, clothing, shelter. Superimposing the Bakke model upon the Plessy model, it is clear that the former is stronger than the latter.

Affirmative Action programs are incompatible with the Bakke model. These programs involve a degree of economic-engineering which the Bakke model finds unacceptable. Economically, the model holds that certain people will have to be written off as liabilities in moving from an age of more to an age of less.³⁹ Written on the model's surface are the high-sounding words of men like Thomas Jefferson and Benjamin Franklin, but, in reality, it is a modified Darwinian concept of the survival of the fittest and slickest. The realistic prediction is, then, that the model will unleash floods of law suits challenging the legality of Affirmative Action programs. In striving to resolve the conflicts that result, the Supreme Court will have to formulate new legal principles to guide the resolution of disputes between the parties. One of these newly developed legal principles will eventually hold that Affirmative Action programs must be abolished in order

to establish a firmer base for democracy. At that point, the modified Darwinian concept of the survival of the fittest and slickest will be substituted by the Court for John Donne's humane affirmation that "Every man is a piece of the Continent, a part of the Maine . . . Any man's (misfortune) diminishes me . . ."

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